

UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF ARIZONA

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| In re COLLEGE PROPERTIES LIMITED PARTNERSHIP, a limited partnership, |) | Chapter 11 Proceedings Case No. 02-05-10095-PHX-CGC and Case No. 02-05-15155-RJH |
| In re COLLEGE PROPERTIES II, an Arizona limited partnership, |) | Jointly Administered |
| Debtors. |) | UNDER ADVISEMENT DECISION RE: FIRST AND FINAL FEE APPLICATION OF ALTFELD BATTAIL & GOLDMAN, P.C. |

Altfeld Battaile & Goldman, P.C. ("ABG") seeks Court approval of its First and Final Fee Application totaling \$225,000 in attorneys fees. The fees are divided into two portions: 1) \$125,000 for prepetition and postpetition work as counsel in the "General Partner Litigation" and 2) \$100,000 for postpetition work as special counsel for Trustee Brian Mullen in this bankruptcy. The dispute here centers solely on whether ABG is entitled to its fees for the work it did prior to its appointment as special counsel. No party objects to the \$100,000 in fees for ABG's postpetition work as special counsel for the Trustee and those fees have already been allowed and approved for payment by the Court.

The prepetition fees arose as follows. In August, 2004, ABG was engaged by Anthony De Petris, Landis Mitchell, and Patricia Palmer to represent them in a suit to enforce their rights as limited partners in College Properties limited partnership against College Properties, Black Mountain Estates, Montage, Inc., Tom D'Ambrosio and others. In that lawsuit, the plaintiffs alleged that Mr. D'Ambrosio, College Properties' general partner, transferred valuable real estate owned by College Properties to other entities owned by Mr. D'Ambrosio and without notice to College Properties' limited partners. In return, College Properties received a \$2,025,000 secured note and deed of trust that was subsequently replaced with worthless shares in Montage, Inc. The real property was then scheduled for auction which, if concluded, would have resulted, according to ABG, in Mr. D'Ambrosio's entities receiving all of the sale proceeds without payment to the limited partner investors. The litigation plan was for plaintiffs, in a

1 representative capacity, to assert class and derivative claims arising out of what ABG refers to as
2 the “Montage Merger.” This representation occurred both pre- and post-petition from July 10,
3 2004, to November 18, 2005, at which time ABG was employed as special counsel to the
4 Trustee.

5 Under the original fee agreement with the three limited partner plaintiffs, ABG agreed to
6 represent them under a contingency fee arrangement for one third of any “gross recovery” ABG
7 obtained on plaintiffs’ behalf, meaning all sums recovered through litigation from whatever
8 source, “whether by payment, settlement, judgment or any other means” from D’Ambrosio or
9 Montage.

10 Eventually, the property was sold through the bankruptcy for \$5,825,000. Subsequently,
11 a global settlement was reached in the General Partner Litigation pursuant to which the Trustee
12 agreed to hold \$425,000 of the proceeds in reserve for Trustee and Professional Fees. Of this
13 amount, ABG has already been awarded \$100,000 for fees as Special Counsel for the Trustee.
14 The Trustee and Trustee’s counsel plan to seek approval of \$100,000 each from the reserve,
15 leaving the Court to determine whether ABG is entitled to an additional \$125,000 in fees for
16 representing the individual plaintiffs prior to its appointment as special counsel. Any amounts
17 not awarded for fees from the reserve will be paid pro rata to the limited partners, not including
18 D’Ambrosio.

19 ABG tacitly acknowledges that its entitlement to fees is not transparently clear. While it
20 is not uncommon for a lawyer who represented a debtor on a contingency basis to be employed
21 as special counsel and thereafter receive payment from the estate when the case is settled or
22 litigated post-petition, that model is not helpful here to ABG because it never represented
23 Debtor. Rather, ABG seeks fees from a bankruptcy estate for work done for third parties (three
24 limited partners) without ever having been hired by Debtor or certified as representative counsel
25 for investors in the Debtor.

26 ABG’s claim for fees is based primarily upon the so-called “common fund” doctrine. It
27 argues that in class and derivative actions in Arizona, the common fund doctrine applies to
28 award fees to lawyers who create, enhance or preserve a common fund for a group of

1 beneficiaries. *In re Estate of Brown*, 137 Ariz. 309, 670 P.2d 414 (App. 1983). The doctrine
2 applies where “1. the suit confers a substantial benefit; 2. the benefit goes to members of an
3 ascertainable class; and 3. ‘the court’s award would spread the costs proportionately among the
4 beneficiaries.’” *Friedman v. Microsoft Corp.*, 213 Ariz. 344, 351, 141 P.3d 824, 831 (App.
5 2006). Here, ABG argues that is representation of the three plaintiffs in the Pinal County lawsuit
6 substantially contribution to the common fund represented by a substantial portion of the
7 proceeds of the sale of the property.

8 Several objections were received, among them Thomas D’Ambrosio, former general
9 partner of Debtors and defendant in the underlying proceedings and Anthony DePetrìs, a limited
10 partner and one of the original three plaintiffs. Mr. D’Ambrosio contends that ABG is not
11 entitled to any fees because its participation was 1) against the wishes of the majority of the
12 limited partners, 2) the common fund created was due to the efforts of Mr. D’Ambrosio and not
13 ABG (and, in fact, ABG’s participation actually hindered and diminished the ultimate return),
14 and 3) the requested fees are not supported by the fee agreement. In addition, Mr. DePetrìs
15 objects on the grounds that the fees are exorbitant and unearned, especially in light of the fact
16 that the settlement was contrary to the original engagement letter in that it was not a return of the
17 plaintiffs’ original investment plus fair market appreciation. Mr. DePetrìs also contends that
18 ABG abandoned its initial clients when it elected to represent the Trustee on behalf of the estate.
19 Last, Montage Industries, Inc. and Casa Del Oro Development, L.L.C., object to the
20 “characterization of the services rendered by the Firm, as well as the characterization of the
21 facts,” although noting no objection to the amount or payment to ABG of any fees.

22 From the Court’s review of the history of this case and the underlying adversary, it finds
23 that the common fund doctrine applies. The common fund doctrine is an equitable doctrine
24 meant to prevent unjust enrichment to a group or class benefitted by an attorneys’ work. *Valder*
25 *Law Offices v. Keenan Law Firm*, 212 Ariz. 244, 249, 129 P.3d 966, 971 (App. 2006). It is an
26 exception to the general rule that attorneys’ fees may be awarded only when expressly
27 authorized by contract or statute. *Id. citing Kerr v. Killian*, 197 Ariz. 213, 217-18, 3 P.3d 1133,
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1 1137-38 (App. 2000). The common fund doctrine does not require that a class actually be
2 certified. *Id.* (“[w]hether the doctrine applies a particular case is not determined by a label, but
3 rather by a proper understanding of the doctrine and its limitations.”). Fees are allowable under
4 the common fund doctrine even where other counsel is employed and some of the class is
5 represented by other counsel, as long as no award is duplicative. *Estate of Brown v. Burch &*
6 *Cracchiolo, P.A.*, 137 Ariz. 309, 670 P.2d 414 (App. 1983).

7 The Court rejects Mr. D’Ambrosio’s argument that ABG hindered rather than helped the
8 ultimate resolution of the case. Regardless of whether a majority of the limited partners objected
9 to the three plaintiffs’ actions in the underlying matter, the fact remains that three of the limited
10 partners pursued this matter originally and, ultimately, it resulted in recovery to all the limited
11 partners, thereby creating a common fund. Further, Mr. D’Ambrosio attempts to take credit for
12 the outcome of this case, but that ignores the fundamental, case-altering fact that without ABG’s
13 prepetition work successfully enjoining the prepetition sale of the property at issue, this property
14 may have been lost to the limited partners for good, especially in light of the legal rights of a
15 bona fide third party purchaser. As it turned out, ABG’s work managed to preserve the property,
16 recover it from Montage and bring it back to the partnership such that it became part of the estate
17 and available to the limited partners. ABG was also instrumental in preparing this case from its
18 early infancy to the point at which it was pursued by the Trustee in this bankruptcy. Without
19 that early work, the Trustee may not have pursued this action at all and, if he had, would have
20 been forced to do this work at that point. With a portion of this work already done, the case was
21 that much further along.

22 Mr. D’Ambrosio’s attempt to limit the fees to the pro rata share of the three named
23 limited partners is not supported by any law and is intrinsically contrary to the purpose of the
24 common fund doctrine. The doctrine is intended to prevent those sharing in the common fund
25 from being unjustly enriched by counsel’s work: As an equitable matter, the fees are to be spread
26 among *all* receiving a portion of the common fund. Because all the limited partners are sharing
27 in the common fund created through no effort of their own, equity supports that they all should
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1 share in the costs of creating that fund in the first instance. There is no justification for
2 excluding any portion of the group and Mr. D'Ambrosio cites no authority for that proposition.

3 The Court also rejects Mr. DePetrus' argument that counsel's fees are exorbitant or
4 unearned. The Court understands that Mr. DePetrus disagrees with the result of this case as was
5 clearly indicated by his objection to the settlement. However, the Court did approve the
6 settlement and found it to be in the best interests of the parties and the estate. Further, it was the
7 Court who forced counsel into making the difficult choice whether to continue its representation
8 of the individual plaintiffs or be appointed as special counsel to the Trustee. That choice was
9 ABG's and it does not diminish the work that it did prepetition or pre-appointment as special
10 counsel.

11 Last, the argument was raised at the hearing by counsel for Mr. DePetrus that ABG
12 should be limited to recovering only what it agreed to under the original fee agreement with the
13 three individual plaintiffs. In particular, the fee agreement provided that ABG would be entitled
14 to a 1/3 contingency fee on any amounts recovered from specific defendants. This argument
15 overlooks the fact that fees are not be sought under the fee agreement. Counsel is not asking for
16 a 1/3 contingency fee against these three individuals under this contract. The Court is inclined to
17 agree with Mr. DePetrus' counsel that this fee agreement was no longer in effect once counsel
18 chose to pursue this matter as special counsel for the Trustee, and that is one clear reason why
19 ABG should not be limited to the terms of the agreement. The fee agreement was abandoned.
20 The second reason why ABG should not be limited is that the common fund doctrine specifically
21 applies where a fee agreement does not. The common fund doctrine applies where there is no
22 contractual or statutory ground for the award of fees. That is the doctrine's purpose, to share the
23 counsel's fees among those enjoying the fruits of the attorneys' labor and who have otherwise
24 have no obligation to pay the attorneys' fees.

25 The same holds true for Mr. D'Ambrosio's argument that ABG should be limited to what
26 it bargained for under the fee agreement signed with the Trustee. This ignores the fact that fees
27 earned as special counsel for the Trustee were separately awarded in the absence of objection
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1 and without prejudice to seeking fees under the common fund doctrine. The fees for work done
2 prior to being appointed special counsel are not controlled by the later signed fee agreement.
3 The common fund doctrine controls how those fees will be calculated.

4 Further, under the common fund doctrine, fees are allowed as either a percentage of
5 recovery or under the more traditional lodestar approach. *See Ladewig v. Arizona Dept. of*
6 *Revenue*, 204. Ariz. 352, 63 P.3d 1089 (Ariz. Tax Ct. 2003). Regardless of the method chosen,
7 the fees are still subject to a reasonableness standard. To illustrate the reasonableness of its fees,
8 ABG applies the lodestar approach. In analyzing this approach, the Court has reviewed the
9 detailed billing statements submitted by ABG and finds that it seeks considerably less than what
10 it would be entitled to on an hourly billing basis.

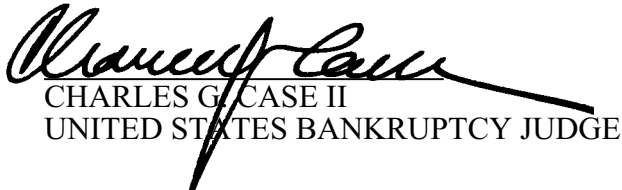
11 According to ABG, it agreed to limit its request to \$125,000 for fees unrelated to its work
12 as special counsel to the Trustee in order to facilitate settlement. The \$125,000 represents work
13 performed from July, 2004, to the date it was appointed special counsel for the Trustee, which
14 was November 18, 2005. This work accounts for nearly 700 hours of work by ABG on behalf of
15 the limited partners, according to ABG's billing statements. As ABG illustrated in its fee
16 application, under a traditional hourly billing approach, this would have amounted to over
17 \$190,000 in fees, plus costs. Reducing its fees to \$125,000 results in approximately a 35%
18 reduction in its hourly billing rates.

19 Viewed as a percentage of the common fund created, the amount requested is likewise
20 reasonable. Given the nature of the recovery in this case, it is more difficult than usual to
21 ascertain the contours of the common fund. However, one thing may be clearly said – the
22 preservation of the asset for the estate was a significant benefit conferred and without which the
23 limited partners may have been left with nothing.

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2 In light of the work performed and the results achieved, the Court finds this amount
3 reasonable and awards the amount of \$125,000. ABG is to submit a form of order.

4 So ordered.

5 **DATED: May 29, 2007**

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9 CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

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